IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 227 OF 2000

HASRAT @ FIROZ AKBARALI PATHAN)
Aged about years, permanently)
at Bismillah Bakery, Old Agra Road,)
Kurla (West) Mumbai 400 070.)
(And at present Appellant is)
undergoing sentence imposed upon)
him at Thane Central Prison,Thane.).. Appellant
(Orig.Accused No.2)

Versus

THE STATE OF MAHARASHTRA)
at the instance of Sr.P.I.M.R.A.)
Marg Police Statioon vide their)
C.R.No.540/91.)..Resopndents

Ms. Pooja P.Bhojane, Advocate, h/f Mr. Nitin Sejpal, Advocate for the Appellant.

Mr. D.P. Adsule, APP, for the State.

CORAM: J.H.BHATIA,J.

DATE : 26th June, 2007.

JUDGMENT

1. The appellant, who is original accused No.2 in Sessions Case No.71 of 1992, was convicted for the offences punishable under Section 452 read with Section 34 I.P.C. and was sentenced to undergo R.I. for seven years with fine of Rs.10,000/- and in default to undergo R.I. for one year, for the offence punishable under Section 392 read with Section 34 of I.P.C. and was sentenced to undergo R.I. for ten years and to pay fine of Rs.10,000/- in default to undergo further R.I. for one year. He was also convicted under Section 397 of I.P.C. but no separate sentence was awarded. He has challenged this conviction and sentence in the present Appeal.

2. The prosecution case is that on 19.10.1991 at about 9.00 p.m., the complainant - Jaywant Ghalani (P.W.1) and some other persons, who were all employees at Persian Bakery, were present in the office of the Bakery at the mezzanine floor and were counting money. At that time, 3 persons entered in the office abruptly. They were armed with choppers and revolver. They directed P.W.1 Jaywant Ghalani and his companions to bow down and not to raise hue and cry otherwise they would be eliminated. Due to the threat, these persons obeyed. Thereafter, one of the culprits holding a chopper

demanded key of the cash box. Reluctantly and due to fear, P.W.1 Jaywant Ghalani handed over the key to that person and each of his companions removed the amount of Rs.13,000/- from the cash box. They also took away the amount of Rs.300/- in the form of coins in the drawer. After taking this amount, all those robbers went away. After the departure, the police was informed. Bakery people also tried to chase the culprits but in vain. About this incident, FIR was lodged by P.W.1 Jaywant Ghalani and on the basis of the same, offence was registered. During the investigation, in all four accused persons were arrested. However, accused Nos.1,2 and 4 absconded and could not be put to trial. Only the present appellant, who was accused No.2, was put to trial.

3. On behalf of the prosecution, in all five witnesses were examined. Relying on their testimony, the learned trial Court convicted and sentenced the appellant as stated above.

4. Out of the five witnesses examined by the prosecution, as far as the present appellant is concerned, the material evidence is of P.W.1 Jaywant Ghalani who lodged the FIR Exhibit 5, his companion P.W.2 Ravindra Rahate and P.W.5 Bhagwan Lahane, who was then the Police Inspector attached to the M.R.A.Marg

Police Station and who investigated the case. The evidence of P.W.1 Jaywant Ghalani reveals that on 19.10.1991, he along with P.W.2 Ravi Rahate,Hemant Patel and Desai was present at the mezzanine floor of the office of Persian Bakery and they were counting cash. At that time, 3 persons abruptly entered into the office. One of them was having a gun or revolver and two were holding knives. Jaywant Ghalani and his companions were directed to bow down and raise their hands. Under threat they also demanded the keys of the drawer and the man with the knife came near P.W.1 Jaywant Ghalani and due to fear, reluctantly he handed over the keys to him. That person removed the amount of Rs.13,000/- from the drawer of the accountant. His other two companions were holding a black colour bag in which the amount was put. After that, they also took away the coins of Rs.300/-. The person holding the gun had threatened Jaywant and others not to raise hue and cry till they had gone out of the sight, otherwise they would shoot them. Saying so, the culprits went away with the cash. After departure of the culprits, Jaywant contacted his employer and also the police. They also shouted and some persons from the Bakery tried to chase the culprits, but none was found. After arrival of the police, statement of P.W.1 Jaywant was recorded and it was treated as FIR Exhibit 5.

5. P.W.2 Ravindra Rahate corroborated the testimony of Jaywant fully as far as the incident is concerned with some discrepancies. According to him, the amount from the drawer was removed by the person holding revolver while according to Jaywant, the person holding the knife had taken out the amount. It is material to note that in the FIR it was mentioned that the person holding the revolver had taken the amount. It may be noted that the evidence was recorded more than 8 years after the incident and, therefore, the possibility of lapse of memory to some extent could not be ruled out. Therefore, I do not give much importance to the discrepancy in the evidence of P.W.1 Jaywant and P.W.2 Ravindra Rahate on this count. In view of the evidence of these two witnesses, corroborated by the report lodged with the police, it can be safely held that three persons had been to the office of Persian Bakery. Two of them were armed with knives or choppers and one was armed with a gun or a revolver. Those 3 persons put the inmates of the office under fear of death and took away the amount of about Rs.13,000/- from the cash box and further coins of Rs.300/-. Thus, it is clear that the offence of robbery was committed and all the three culprits were armed with the deadly weapons like revolver or choppers and, therefore, the culprits would be liable to be convicted and sentenced for the offences punishable under Section 392 read with Section 397

I.P.C. As the culprits had entered into the office after having made preparation to commit the offence of robbery, after putting the persons under feat of hurt or assault, the offence under Section 452 I.P.C. was also committed.

6. The prosecution has to bring home guilt to the accused by the consistent, cogent, reliable and trustworthy evidence. In the present matter, the prosecution case is based wholly on the identification of the present appellant by P.W.1 Jaywant and P.W.2 Ravindra because they were the eye-witnesses of the incident. Admittedly, the culprits were not known to these witnesses and they had seen them for the first time at the time of incident. It was not possible for them to know the names of the culprits.

7. At the outset, it may be stated that identification parade was held on 23.11.1991 and again on 17.12.1991 by P.W.4 - Pravinkumar Chandrasen, who was Special Executive Magistrate and Memoranda Exhibit 10 and Exhibit 11 were prepared. For both the identification parades, P.W.1 Jaywant, P.W.2 Ravindra and other witnesses were called. The record reveals that during the test identification parade held on 23.11.91, as per Exhibit 10, accused No.3 - Sayyed Ahmed Farid Ahmed Pathan was a suspect and he was identified.

On 17.12.91, in the T.I. parade, as per Exhibit 11, the suspect was accused No.4 - Hasan Ali Mustkin Shaikh and he was identified by the witnesses. The record clearly reveals that the present appellant, who is accused No.2, was not the person, who was required to be identified during any of these two identification parades and, therefore, the evidence pertaining the test identification parade held by P.W.4 on 23.11.1991 as well as on 17.12.91 is not of any use as far as the present appellant is concerned.

8. P.W.5 Police Inspector Bhagwan Lahane deposed that the present appellant/accused No.2 was arrested in the morning on 20.10.1991 i.e. next day after the incident. According to him, while interrogation of the present appellant was in progress, P.W.1 Jaywant and P.W.2 Ravindra came to the police station and pointed out the accused as one of the culprits and as the person who was armed with a revolver. Both P.W.1 and P.W.2 claimed to have identified the accused before the Court also. As such no test identification parade was held nor any record was prepared about the identification of the present appellant by the witnesses. The learned trial court observed that it was the spontaneous identification by the witnesses when they came to the police station and abruptly saw the accused and identified him. The learned trial Judge observed that

in such circumstances, it was not necessary to hold test identification parade. There can be no dispute with the proposition that if the witnesses abruptly come across the culprit and point out as such,the identification can be relied upon without holding formal test identification parade. However, the question is whether P.W.1 Jaywant and P.W.2 Ravindra had identified the present appellant spontaneously when they had been to the police station. For this, it will be necessary to scrutinize the evidence of both these witnesses minutely and carefully, particularly because except the identification, there is no other evidence. No recovery was made from the present appellant nor any weapon was recovered from him even though he was in police custody and that too from the very next morning after the incident.

9. P.W.1 Jaywant deposed that after a few days, he was called for identification of the accused at the police station. He identified only one accused at that time. That accused was a man, who was having a knife and standing near him and to whom he had given the keys. Nothing was recorded about that identification. He also deposed that after about 7 days, he was again called for further identification and he identified one more person who was holding a revolver at the time of incident and, according to him, the present appellant is that person.

From this evidence of P.W.1 - Jaywant, it is clear that he and P.W.2 - Ravindra had not been to the police station without prior intimation and it is not his case that they had abruptly come across the appellant and had identified him as culprit spontaneously on the next day of the incident. In view of this evidence, one thing is clear that P.W.1 Jaywant did not identify the present appellant next day after the incident at the police station and that too spontaneously. As per his above evidence, he was called to the police station twice. Firstly, a few days after the incident and secondly, 7 days after that. Both the time he was called for identification of the accused persons. First time, he identified one of the culprits, but he was not the present appellant. Second time, he identified the present appellant. As pointed out earlier, with the help of the Special Executive Magistrate, test identification parade was held on 23.11.91 and 17.12.91 and the present appellant was not the suspect required to be identified during the test identification parade.

10. P.W.2 Ravindra, however, deposed that on the next day, he identified one person who was the accused No.2 and, according to him, he is the person who was holding revolver and had taken the money. P.W.2 - Ravindra also clearly deposed that they were called for identification of a suspect on next day. It means

police had called both these witnesses to the police station for identification of the suspect. So, it could not be spontaneous identification. It appears that the learned trial Court missed this admission made by these two witnesses in the examination itself that they were called to the police station for identification of suspects and thus the story of spontaneous identification by them, as they happened to be at the police station when the interrogation of the accused was going on, is not corroborated.

11. About the identification of the present appellant, there is inconsistency in the evidence of P.W.1 Jaywant and P.W.2 Ravindra. According to P.W.1 Jaywant, he had identified the present appellant when he was called for identification on second occasion. According to P.W.2 Ravindra, he had identified the present appellant on the next day. If the present appellant was shown by them and he was identified on the next day, there could not be any such inconsistency in the evidence of these two witnesses in this respect.

12. It is well-settled position of law that if the suspect/accused is shown to the witnesses by the police before the T.I. parade, much importance cannot be given to the identification during the T.I. parade. Therefore, the precaution is required to be taken before

the test identification parade that the suspects or the accused are not shown to the witnesses. If they are shown before the T.I. parade, the very purpose of the test identification is lost and frustrated. In the present case, test identification parade was not held as far as the present appellant is concerned.Both witnesses were called to the police station where the accused was shown to them and they were required to identify him. As in view of the evidence of these two witnesses, as pointed out earlier, this identification was not spontaneous. The identification of the appellant before the police officer at the police station could not be given much importance.

13. In **1998 ALL MR (Cri) 20 Ravindra Kondiba Pol and Anr. vs. The State of Maharashtra,** the Division Bench of this Court emphasised the importance of not showing the accused to the witnesses prior to the test identification parade. The Division Bench observed as follows :-

> "We wish to emphasize that in a case resting on identification evidence, before a court can record/sustain a conviction it should be satisfied that the investigation is beyond reproach and the investigating agency prior to the test identification had not shown the

> suspects to the witnesses. Then and then alone it should record/sustain a conviction. Here it is not so. It is heavily tainted. Once the court loses faith in the fairness of the investigating agency, it becomes unsafe to either record/or confirm a conviction based on evidence of identification. In situations like this the benefit of doubt is given to the accused. And it would also have to be given to appellant Ashok Anandrao More."

In the present case, even the test identification parade was not held and straightaway the accused was required to be identified at the police station in the presence of the police officer. Therefore, no importance can be given to such identification.

14. It is also well-settled that the evidence of identifying the accused persons at the trial for the first time is from its very nature inherently of a weak character. In the **State of H.P. v. Lekh Raj & Anr. reported in (2000) 1 SCC 247**, the Supreme Court made the following observations in para 3 :

> "....The evidence of identifying the accused person at the trial for the first time is, from its very nature, inherently of a weak character. ... Though the holding of identification

> proceedings are not substantive evidence, yet they are used for corroboration purposes for believing that the person brought before the court was the real person involved in the commission of the crime. The identification parade even if held, cannot, in all cases, be considered as safe, sole and trustworthy evidence on which the convictin of the accused could be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant."

In the present case, firstly, the accused were shown to the witnesses at the police station by the police. The evidence was recorded almost 8 years after the incident. The evidence of witnesses reveals that they were present in the Court on number of occasions prior to recording of evidence and they had seen the accused while going to the Court. Therefore, even the identification before the Court is not reliable.

15. Taking into consideration the evidence on record, I find that the evidence about identification of the present appellant as one of the culprits is not consistent, cogent, reliable and trustworthy. It would be unsafe to base conviction on such identification.

The learned trial court committed serious mistake in holding that the witnesses had spontaneously identified the present appellant and, therefore, test identification parade was not required. As pointed out above, except the identification of the present appellant, there is no other direct or circumstantial evidence to corroborate the prosecution story against him. I find that the evidence on record is not sufficient to prove beyond reasonable doubt that the present appellant was one of the three culprits who had committed offence of robbery.

16. In the result, the Appeal is allowed. The impugned order of conviction and sentence is set aside. It is reported that the accused-appellant is still in jail, may be because of this and some other cases. He be set at liberty forthwith, if not required in any other case.

(J.H.BHATIA,J.)